No. 16-564

In the Supreme Court of the United States

ROGER DARIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Acting Solicitor General
Counsel of Record
KENNETH A. BLANCO
Acting Assistant Attorney General
FINNUALA K. TESSIER
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's motion to dismiss a criminal complaint on the ground that his prosecution in the United States violates the Due Process Clause of the Fifth Amendment was correctly denied based on the fugitive-disentitlement doctrine and on its lack of merit.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter*. The order of the district court (Pet. App. 4a-22a) is reported at 118 F. Supp. 3d 620. The order of the magistrate judge (Pet. App. 23a-60a) is reported at 99 F. Supp. 3d. 409.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 2016. A petition for rehearing was denied on June 28, 2016 (Pet. App. 61a-62a). On September 8, 2016, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including October 26, 2016, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On December 12, 2012, the government filed a criminal complaint in the Southern District of New

York against petitioner, a Swiss national. Compl. 27. The complaint charged petitioner with one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. 1343 and 1349. Compl. 1-2. Without making himself available for arrest in the United States or appearing in district court, petitioner moved to dismiss the complaint. Pet. App. 7a. The district court denied the motion. *Id.* at 4a-22a. Petitioner appealed the denial and sought a writ of mandamus. The court of appeals dismissed petitioner's appeal for lack of jurisdiction and denied the mandamus petition. *Id.* at 1a-3a.

1. Petitioner worked as a derivatives trader at UBS AG (UBS) in Tokyo, Zurich, and Singapore. Compl. 6; see Pet. App. 25a. While employed at UBS, petitioner traded short-term interest rate products. In addition, he was responsible for overseeing UBS's submissions affecting calculation of the London Interbank Offered Rate (LIBOR) for Yen, a key global benchmark interest rate. Compl. 6.

The complaint alleges that petitioner participated in a fraudulent scheme to manipulate the Yen LIBOR to the disadvantage of UBS's counterparties in the United States and elsewhere. Compl. 4-6. Petitioner was charged along with a co-defendant, Tom Hayes, who also worked as a trader at UBS during the relevant time period.[1] *Id.* at 1, 6. According to the complaint, petitioner and Hayes caused UBS "repeatedly to provide false and misleading information in its daily Yen LIBOR submissions." *Id.* at 8.

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[1] On August 3, 2015, Hayes was convicted in London's Southwark Crown Court of eight counts of fraud for his role in manipulating the Yen LIBOR. Gov't C.A. Mot. to Dismiss 5.

The complaint alleges that the conspiracy involved a variety of overt acts in the Southern District of New York, including: (1) Hayes entering two trades with a counterparty based in Purchase, New York; (2) petitioner and Hayes engaging in electronic chats routed through the Southern District; and (3) petitioner and Hayes causing the publication of manipulated LIBOR rates in New York. Compl. 2. The complaint also alleges that the scheme had an effect on one or more financial institutions within the meaning of 18 U.S.C. 20. Compl. 3; see 18 U.S.C. 20 (defining the term "financial institution" as used in Title 18).

On December 12, 2012, an arrest warrant issued for petitioner. Pet. App. 7a. Petitioner was not arrested, however, because he was residing in Switzerland. *Ibid.* Nor did petitioner make any appearance in the district court or otherwise submit to the court's jurisdiction. *Ibid.*

2. a. On October 2, 2014, nearly two years after the complaint was filed, petitioner, through counsel and without appearing in court, filed a motion to dismiss the complaint. D. Ct. Doc. 6. He argued that the complaint involves an improper extraterritorial application of the conspiracy and wire fraud statutes and that it fails to allege a "sufficient nexus" between petitioner and the United States to satisfy the requirements of the Due Process Clause. Pet. App. 5a. The government argued that the fugitive-disentitlement doctrine prevented petitioner from challenging the complaint without appearing in a United States court; the government also opposed the motion on the merits. *Ibid.*

b. The district court denied the motion to dismiss. Pet. App. 4a-22a.[2]

i. The district court determined that denial of the motion was warranted under the fugitive-disentitlement doctrine, which "bar[s] fugitives from seeking judicial relief." Pet. App. 8a-9a. The court found that petitioner is a fugitive because he "allegedly violated United States law; a warrant for [his] arrest was issued * * * ; [he] would be arrested if he entered the United States (or if he left Switzerland); and [he] has avoided arrest by remaining in Switzerland." *Id.* at 14a. The court concluded that the fact that petitioner "did not flee the United States should not preclude him from being labeled a fugitive as a matter of law." *Ibid.*

The district court also ruled that the equities weighed in favor of disentitlement. Pet. App. 9a, 14a-17a; see *id.* at 17a ("each factor favors disentitlement"). First, the court explained, "mutuality is clearly lacking," because if the court dismissed the complaint petitioner would benefit, but if the court "affirm[ed] the complaint" petitioner would (according to his counsel) "continue to ignore the complaint and arrest warrant." *Id.* at 15a. Second, the court found, petitioner "is flouting the judicial process" not merely

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[2] Petitioner's motion was initially denied by a magistrate judge, who declined to apply the fugitive-disentitlement doctrine, Pet. App. 32a-40a; found that the complaint involved a domestic application of the wire fraud statute, *id.* at 40a-45a; and concluded that the complaint "alleges a nexus between [petitioner] and the United States sufficient to satisfy due process concerns," *id.* at 50a. When both parties objected to the magistrate judge's order, the district court construed it as a report and recommendation and considered the matter de novo. *Id.* at 6a, 8a.

"by being absent * * * but rather by being absent, appearing through his lawyers, and openly stating that he will not comply with any unfavorable result—while at the same time asking the [c]ourt to rule in his favor." *Id.* at 16a. Third, the court reasoned, ruling on the merits of petitioner's motion "would encourage similarly situated defendants to remain outside the United States" and would "eradicate any incentive for a foreign defendant to comply with an arrest warrant, submit to a court's jurisdiction, and respond to the Government's allegations while enjoying the constitutional protections afforded to criminal defendants." *Id.* at 16a-17a. Fourth, the court concluded, petitioner's "evasion prejudices the Government," making it impossible for the government to prosecute "what is already a very complex case." *Id.* at 17a.

ii. As an "alternative holding," the district court explained that "[e]ven if the fugitive disentitlement doctrine did not apply, [petitioner's] motion would be denied on the merits." Pet. App. 17a & n.4. The court concluded that the case involved a domestic application of the wire fraud statute because the complaint alleged that petitioner manipulated LIBOR using United States wires. *Id.* at 18a. The court applied Second Circuit precedent ruling that under those circumstances "the Fifth Amendment * * * requires an inquiry into the 'fundamental fairness' of the criminal complaint," *id.* at 20a (citing *United States* v. *Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011), cert. denied, 132 S. Ct. 2374 (2012)), and concluded that "[s]ince [petitioner] allegedly conspired to manipulate the LIBOR using United States wires, and since [petitioner] was likely aware that this conduct would affect financial markets in the United States, his prosecution by

United States authorities is not fundamentally unfair," *ibid.*; see *id.* at 19a.

Even if "a 'nexus' inquiry" akin to the test for specific personal jurisdiction in the civil context were required instead, the district court reasoned, "[t]he complaint alleges a sufficient connection to the United States." Pet. App. 20a. The court noted that the "complaint alleges that [petitioner], using United States wires, 'caused the publication of the manipulated interest rate information in New York, New York,'" *ibid.* (quoting Compl. 2), and that petitioner's co-conspirator "had ample connections to the United States," *ibid.*; see *ibid.* (explaining that "under general conspiracy principles actions taken by co-conspirators can be imputed to other co-conspirators").

3. Petitioner appealed the denial of his motion to dismiss the complaint and filed a petition for a writ of mandamus. The government moved to dismiss the appeal for lack of jurisdiction, arguing that it was neither a final judgment nor an appealable collateral order.

In a one-paragraph, unpublished order, the court of appeals granted the motion to dismiss the appeal, stating that "the district court's order is not immediately appealable." Pet. App. 3a (citing *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 798 (1989)). The court of appeals also denied the mandamus petition on the ground that petitioner "has not demonstrated that exceptional circumstances warrant the requested relief." *Ibid.* (citing *In re City of New York*, 607 F.3d 923, 932 (2d Cir. 2010)).

ARGUMENT

Petitioner contends (Pet. 14-30) that the dismissal of his appeal for lack of jurisdiction constitutes an

endorsement by the court of appeals of an improper application of the fugitive-disentitlement doctrine and an improper test for determining whether his prosecution comports with the Due Process Clause. Those issues are not properly presented here. The court of appeals correctly ruled, in a brief unpublished order, that the non-final order denying petitioner's motion to dismiss the complaint was not immediately appealable, and that decision does not conflict with any decision of this Court or another court of appeals. Further review is therefore not warranted.

1. Given the procedural posture of this case, the decision of the court of appeals does not implicate either of the questions presented in the petition: whether "foreign criminal defendants must voluntarily travel to the United States, and subject themselves to jurisdiction here, to challenge the government's constitutional authority to hale them into court in this country," Pet. i, and whether the Due Process Clause imposes in criminal cases the same "minimum contacts" standard applied to assess personal jurisdiction in civil cases. The court of appeals ruled only that it lacked jurisdiction over petitioner's appeal from the denial of his motion to dismiss the criminal complaint because such a denial "is not immediately appealable." Pet. App. 3a.[3] The court of appeals did not rule on the

[3] The court of appeals also denied petitioner's mandamus petition on the ground that it did not meet the stringent standards for granting that form of extraordinary relief, but he does not appear to challenge that aspect of the court's decision. See Pet. 29 n.10. In any event, given the limitations on a court's ability to grant mandamus relief, see, *e.g.*, *Cheney* v. *United States Dist. Court for the D.C.*, 542 U.S. 367 (2004), the denial of the mandamus petition is not an appropriate vehicle for review of any underlying substantive issues.

merits of the district court's decision to apply the fugitive-disentitlement doctrine, or determine whether —in the absence of such disentitlement—the motion to dismiss should have been assessed under the due process standard that petitioner urges.[4] Because the court of appeals has not passed on those issues, they are not properly presented for review by this Court at this interlocutory stage of the proceedings. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992); see also *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (explaining that an interlocutory posture "alone furnishe[s] sufficient ground for the denial" of the petition). Indeed, to the extent that the court of appeals lacked jurisdiction to consider petitioner's interlocutory appeal, the underlying merits issues addressed in the district court's order are not presented here at all.

2. The only issue on which this Court's review conceivably could be sought at this stage of the case is whether the court of appeals correctly decided that it lacked jurisdiction over the appeal from the denial of the motion to dismiss. The court's citation in its one-paragraph order to *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 798 (1989), indicates that it rejected petitioner's argument that jurisdiction over his

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[4] Petitioner effectively concedes that the court of appeals issued no explicit holdings on those issues. See, *e.g.*, Pet. 3 ("the Second Circuit implicitly sided" with other circuits on the due process question); *id.* at 19 (court of appeals "countenanc[ed] * * * the district court decision" with respect to the district court's due process analysis); *id.* at 31 ("[t]he Second Circuit sanctioned the district court's order" on fugitive disentitlement).

appeal was proper under the collateral-order doctrine. See Pet. App. 3a; see also *Midland Asphalt*, 489 U.S. at 798 (discussing the "narrow exception to the normal application of the final judgment rule" that "has come to be known as the collateral order doctrine"). But neither of the questions presented in the petition mentions the collateral-order doctrine, nor is that issue "fairly included." Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

In the body of the petition, petitioner does assert (Pet. 23) that the court of appeals "[m]isapplie[d]" the doctrine. Application of the well-established collateral-order doctrine to the particular claim at issue in this case—even assuming that the issue was within the scope of one of the questions petitioner has presented—would not warrant this Court's review. That is especially so given petitioner's reliance on the idiosyncratic facts of his own situation. See Pet. 26 (asserting that petitioner's specific geographical location matters to the jurisdictional analysis). In any event, petitioner is mistaken. The court of appeals correctly decided that it lacked jurisdiction over the appeal, and its decision does not create any conflict or otherwise warrant this Court's review.

a. Section 1291 of Title 28 limits the jurisdiction of courts of appeals to "final decisions of the district courts." 28 U.S.C. 1291. "This final judgment rule requires that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits. * * * In a criminal case, the rule prohibits appellate review until conviction and imposition of sentence." *Flanagan* v. *United States*, 465 U.S. 259,

263 (1984) (citations and internal quotation marks omitted).

The collateral-order doctrine is a limited exception to that rule. See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 467-468 (1978) (citing *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)). To fall within the "small class" of decisions that constitute immediately appealable collateral orders, a decision must "(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment." *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 522 (1988) (citations and internal quotation marks omitted).

The collateral-order exception is "interpreted * * * 'with the utmost strictness' in criminal cases." *Midland Asphalt*, 489 U.S. at 799 (quoting *Flanagan*, 465 U.S. at 265). The Court has allowed collateral-order appeals only for motions to reduce bail, motions to dismiss on double jeopardy grounds, motions to dismiss under the Speech or Debate Clause, and orders permitting involuntary medication to restore competence to stand trial. See *Stack* v. *Boyle*, 342 U.S. 1 (1951); *Abney* v. *United States*, 431 U.S. 651 (1977); *Helstoski* v. *Meanor*, 442 U.S. 500 (1979); *Sell* v. *United States*, 539 U.S. 166 (2003). By contrast, orders denying a motion to dismiss on other grounds—including other constitutional grounds—do not constitute immediately appealable collateral orders. See, *e.g.*, *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 270 (1982) (per curiam) (denial of motion to dismiss based on alleged prosecutorial vindictiveness not immediately appealable); *United States* v. *McDonald*, 435 U.S. 850, 863 (1978) (denial of motion to dismiss

based on Sixth Amendment speedy trial issue not immediately appealable).

Applying that legal framework, the court of appeals correctly concluded that the collateral-order exception is inapplicable here. The district court's order does not conclusively determine whether the complaint against petitioner should be dismissed on Fifth Amendment grounds, since petitioner could renew his fact-intensive due process "nexus" argument in the district court after an indictment is returned, discovery has been produced, and any relevant pre-trial motions have been decided. Petitioner could also raise any preserved argument that the charged offense did not involve a sufficient nexus to the United States in an appeal after conviction and sentencing. See generally *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 107 (2009) (explaining that the fact that a ruling "may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment . . . has never sufficed" to bring a case within the scope of the collateral-order exception) (citation omitted).[5] While petitioner apparently does

[5] Almost all of the cases that petitioner cites (Pet. 16) for the proposition that "the Due Process Clause of the Fifth Amendment constrains the prosecutions of foreign defendants for conduct occurring entirely abroad" involved post-conviction review. See, *e.g.*, *United States* v. *Rojas*, 812 F.3d 382, 393 (5th Cir.), cert. denied, 136 S. Ct. 2420, 136 S. Ct. 2421, and 136 S. Ct. 2423 (2016); *United States* v. *Ibarguen-Mosquera*, 634 F.3d 1370, 1378-1379 (11th Cir. 2011); *United States* v. *Al Kassar*, 660 F.3d 108, 117-119 (2d Cir. 2011), cert. denied, 132 S. Ct. 2374 (2012); *United States* v. *Cardales*, 168 F.3d 548, 553 (1st Cir.), cert. denied, 528 U.S. 838 (1999); *United States* v. *Martinez-Hidalgo*, 993 F.2d 1052, 1055-1057 (3d Cir. 1993), cert. denied, 510 U.S. 1048 (1994); *United States* v.

not plan to "voluntarily travel to this country," Pet. 26, thus stymying further proceedings in his case, a defendant cannot manufacture appellate jurisdiction by simply refusing to face charges.

Petitioner claims that the district court's order should have been deemed appealable because he has a "right not to stand trial." Pet. 25 (citation omitted). But this Court has construed the "right not to be tried" restrictively, explaining that "[a] right not to be tried in the sense relevant to the [collateral-order] exception rests upon an explicit statutory or constitutional guarantee that trial will not occur—as in the Double Jeopardy Clause ('nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb') or the Speech or Debate Clause ('([F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place')." *Midland Asphalt*, 489 U.S. at 801 (brackets in original; citation omitted); see, *e.g.*, *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994) (noting that under a less stringent approach "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial'"); *Hollywood Motor Car Co.*, 458 U.S. at 269 ("Even when the vindication of the defendant's rights requires dismissal of charges altogether, the conditions justifying an interlocutory appeal are not necessarily satisfied.").

Petitioner has not satisfied that demanding standard. "[A] violation of the general prohibition of the Due Process Clause" like the one that petitioner has

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Davis, 905 F.2d 245, 248-249 (9th Cir. 1990), cert. denied 498 U.S. 1047 (1991).

asserted "is not a violation of an 'explicit statutory or constitutional guarantee that trial will not occur,' as that phrase is used in *Midland Asphalt*." *United States* v. *Macchia*, 41 F.3d 35, 38 (2d Cir. 1994); see *United States* v. *Wampler*, 624 F.3d 1330, 1335 (10th Cir. 2010), cert. denied, 564 U.S. 1021 (2011); cf. *United States* v. *Levy*, 947 F.2d 1032, 1034 (2d Cir. 1991) (explaining that "courts have rejected interlocutory appeals of orders in criminal cases denying dismissal on grounds of subject matter jurisdiction" and "personal jurisdiction," including when a foreign defendant claims that a United States court cannot try him) (collecting cases).[6] Accordingly, the court of appeals correctly rejected petitioner's attempt to justify appellate jurisdiction under the collateral-order doctrine.

b. Contrary to petitioner's contention (Pet. 28-29), the decision below does not conflict with the decision of any other court of appeals. Petitioner relies on two decisions from the Seventh Circuit analogizing rulings made by foreign courts in extradition proceedings to findings that preclude retrial on double jeopardy grounds. Pet. 28-29 (citing *United States* v. *Kashamu*, 656 F.3d 679 (7th Cir. 2011), cert. denied, 132 S. Ct. 1046 (2012), and *United States* v. *Bokhari*, 757 F.3d 664 (7th Cir. 2014)). But the decision below is not inconsistent with either of them.[7]

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[6] Petitioner's contrary argument relies on civil immunity decisions that predate *Midland Asphalt*. See Pet. 25-26 (citing *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742-743 (1982), and the plurality opinion in *Mitchell* v. *Forsyth*, 472 U.S. 511, 525 (1985)). Those decisions are inapplicable in this criminal case.

[7] Petitioner stated in the court of appeals that he is "aware of no case that has decided whether a ruling on 'sufficient nexus' [under

In *Kashamu*, the defendant argued that he should not stand trial as a matter of collateral estoppel because a judge in another country had already determined that he had not committed the crime in question. See 656 F.3d at 681-682. The court of appeals observed that "there is an exception [to the finality requirement] when the ground is double jeopardy * * * because the double jeopardy clause protects a defendant against being retried, and not just against being convicted—and the double jeopardy clause has been held to incorporate the doctrine of collateral estoppel." *Id.* at 682. The court therefore concluded that an existing exception to the finality rule was applicable. See *ibid.*; see also *id.* at 682-683 (analogizing to official immunity); compare *United States* v. *Guevara*, 443 Fed. Appx. 641, 643 (2d Cir. 2011) (court of appeals lacked jurisdiction over appeal from denial of motion to dismiss indictment to review extradited defendant's claim that opinion ordering his extradition required that charges alleged in indictment be narrowed).

In *Bokhari*, the defendant likewise argued that the findings of a foreign court during extradition proceedings precluded his trial on the underlying charges in the United States. 757 F.3d at 669-670. Applying "[t]he same analysis" as in *Kashamu*, the court found that Bokhari's claim was closely akin to the claim of "a defendant invoking his right against double jeopardy." *Ibid.*

Unlike *Kashamu* and *Bokhari*, this case does not involve a motion to dismiss that rests on the decision of a foreign court assertedly exonerating the defend-

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the Due Process Clause] is appealable under the collateral order doctrine." Pet. C.A. Opp. to Mot. to Dismiss 2.

ant. Accordingly, the Seventh Circuit's analogy to the double jeopardy basis for a pretrial appeal has no relevance here. *Kashamu* and *Bokhari* do not address the proper treatment of an interlocutory appeal by a defendant who simply refuses to stand trial, despite the fact that no court has determined or even suggested that the trial should not take place.

3. Review of the court of appeals' application of the collateral-order doctrine in this case is also unwarranted for an additional reason. Even if this Court were to take up the issue and rule in petitioner's favor, petitioner would derive no benefit from that ruling because the ultimate result in the court of appeals—that is, leaving the district court's decision denying the motion to dismiss undisturbed—would not change. The district court correctly decided that the fugitive-disentitlement doctrine bars petitioner's motion and that, in the alternative, his due process argument lacks merit. Neither aspect of that decision conflicts with any decision of this Court or another court of appeals.[8]

a. i. As this Court has explained, the fugitive-disentitlement doctrine rests in part on enforceability concerns: when an individual remains at large, there can be "no assurance that any judgment [the court] issue[s] would prove enforceable." *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 239-242 (1993); see *Degen* v. *United States*, 517 U.S. 820, 824-825 (1996). The doctrine also "encourages voluntary surrenders,"

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[8] Accordingly, even if the questions raised by petitioner about the fugitive-disentitlement doctrine and the Due Process Clause—neither of which was addressed by the court of appeals—somehow could be deemed properly presented here, this Court's review of those questions would not be warranted.

deters unlawful conduct, and "promotes the efficient, dignified operation" of the courts. *Ortega-Rodriguez*, 507 U.S. at 241 (citation omitted); see *id.* at 240 (explaining that a defendant's failure to appear before the authorities is "tantamount to waiver or abandonment").

The district court correctly found those justifications applicable in this case and exercised its equitable authority to disentitle petitioner from obtaining dismissal of the complaint against him. Any adverse order is unenforceable in petitioner's absence. See *Ortega-Rodriguez*, 507 U.S. at 239-240; see Pet. 26 (arguing that "[t]he government lacks a legal basis to extradite" petitioner and he "will not voluntarily travel to this country"). Petitioner's actions are "the very essence of flouting the judicial process," since he chooses to be "absent, appear[] through his lawyers, and openly stat[e] that he will not comply with any unfavorable result—while at the same time asking the [c]ourt to rule in his favor." Pet. App. 16a. And ruling on the merits of petitioner's due process argument would "eradicate any incentive for a foreign defendant to comply with an arrest warrant, submit to a court's jurisdiction, and respond to the Government's allegations." *Id.* at 16a-17a.

Petitioner claims (Pet. 33) that he would be affected by an adverse decision because it would limit his international travel. But that consequence alone does not entitle petitioner to judicial resolution of his motion to dismiss. If limits on travel related to a party's fugitive status negated application of the fugitive-disentitlement doctrine, the doctrine would cease to exist.

Petitioner also briefly asserts (Pet. 33) that he has not "flout[ed] the judicial process" because he did not "escape the United States." But petitioner has flouted the process by asking for a favorable ruling—and insisting that his refusal to submit to the jurisdiction of the U.S. courts is the very thing that entitles him to relief, see Pet. 26, 29—while declining to bear the consequences of an unfavorable ruling. That is the essence of the behavior that the fugitive-disentitlement doctrine is designed to discourage. See *Degen*, 517 U.S. at 824-825; *Ortega-Rodriguez*, 507 U.S. at 239-242; see also, *e.g.*, *Schuster* v. *United States*, 765 F.2d 1047, 1050 (11th Cir. 1985); *Bokhari*, 757 F.3d at 672-673.

ii. Contrary to petitioner's contention (Pet. 31-32), the district court's application of the fugitive-disentitlement doctrine is not inconsistent with the Seventh Circuit's decision in *In re Hijazi*, 589 F.3d 401, 413 (7th Cir. 2009). That case did not involve the fugitive-disentitlement doctrine at all. Rather, the court of appeals deemed the defendant—a Lebanese national living in Kuwait—to be a "non-fugitive" because, on learning that he had been indicted in the United States, he "surrendered himself to the Kuwaiti authorities." *Id.* at 409, 412; see *id.* at 405-406. Moreover, when ordering the district court to consider the defendant's motion to dismiss, the Seventh Circuit relied on factors not present in this case: the "delicate foreign relations issues" raised by the prosecution, which the Kuwaiti government had formally protested, and the fact that the defendant faced a "significant enough threat of prosecution in the United States to satisfy any mutuality concerns that may exist." *Id.* at 411, 414; compare *id.* at 413 (explaining that "a suc-

cessor government in Kuwait could change its mind about cooperating with the United States"), with Pet. 4, 26, 29 (explaining that the Swiss Federal Constitution does not authorize the extradition of Swiss nationals), and Federal Constitution of the Swiss Confederation, Apr. 18, 1999, Tit. 2, Ch. 1, Art. 25, Para. 1 ("Swiss citizens may not be expelled from Switzerland and may only be extradited to a foreign authority with their consent.").

b. i. The district court also correctly ruled that petitioner's due process argument lacks merit under any legal standard—including the standard that petitioner claims should be applied to him. See Pet. App. 17a-20a. The complaint alleges that petitioner, using United States wires, "'caused the publication of the manipulated interest rate information in New York, New York.'" *Id.* at 20a (quoting Compl. 2); see *ibid.* (petitioner "was likely aware that this conduct would affect financial markets in the United States"). Petitioner's scheme was aimed at promoting the financial interests of the conspirators at the expense of trading partners, including partners based in the United States and, specifically, in the Southern District of New York. Moreover, petitioner's co-conspirator "had ample connections to the United States," including trading with a counterparty based in Purchase, New York, *ibid.* (citing Compl. 14)—and under basic conspiracy principles, acts taken by petitioner's co-conspirator can be imputed to him. See, *e.g.*, *Ford* v. *United States*, 273 U.S. 593, 622 (1927) ("[J]urisdiction exists to try one who is a conspirator, whenever the conspiracy is in whole or in part carried on in the

country whose laws are conspired against.").[9] Those facts are sufficient to justify prosecution of petitioner in this country.

ii. The district court's rejection of petitioner's due process argument does not implicate any split in authority, for several reasons.

First, the district court correctly found that petitioner did not qualify for relief under either the more stringent due process standard that petitioner claims some courts have adopted or the more lenient due-process standard that petitioner claims various other courts have adopted. Accordingly, a choice between the standards could not make any difference to the outcome of this case.[10]

Second, petitioner has not identified any criminal case involving a domestic application of U.S. law that applies the more lenient standard for which he advocates. Rather, every criminal case that petitioner cites (Pet. 16-17) as applying the "sufficient nexus" test has involved an extraterritorial application of the law. See, *e.g.*, *Rojas*, 812 F.3d at 393 ("[W]e must also

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[9] Petitioner argues in a footnote that the acts of a co-conspirator are not relevant to the analysis, citing in support two cases assessing personal jurisdiction in civil cases. Pet. 19 n.6 (citing *Walden* v. *Fiore*, 134 S. Ct. 1115, 1122 (2014), and *Calder* v. *Jones*, 465 U.S. 783, 790 (1984)). But those civil cases do not address the criminal-law principle that a co-conspirator is responsible for the acts of those with whom he conspires.

[10] Among other things, the district court relied on a Second Circuit decision that petitioner embraces as articulating the due process standard he believes to be correct. See Pet. App. 20a-21a; Pet. 19 (citing *Al Kassar*, 660 F.3d at 118)). Petitioner incorrectly asserts (Pet. 19) that the terse court of appeals order in this case, which never mentioned the Due Process Clause, somehow departed from that binding panel decision.

consider whether applying a statute extraterritorially violates due-process principles."); *United States* v. *Lawrence*, 727 F.3d 386, 396 (5th Cir. 2013), cert. denied, 134 S. Ct. 1336, and 134 S. Ct. 1340 (2014) (extraterritorial application of 21 U.S.C. 963 did not violate due process); *United States* v. *Perlaza*, 439 F.3d 1149, 1168 (9th Cir. 2006) (extraterritorial application of the Maritime Drug Law Enforcement Act did not violate due process); *United States* v. *Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998) (same), cert. denied, 528 U.S. 842 (1999); *Davis*, 905 F.2d at 248-249 ("In order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States."). Petitioner does not dispute the district court's holding that this case involves a domestic application of the relevant criminal statutes. See Pet. App. 18a; see also Pet. C.A. Opp. to Mot. to Dismiss 5 n.3 (abandoning extraterritoriality argument in the court of appeals).[11]

Finally, the district court's decision does not conflict with the civil personal-jurisdiction cases on which petitioner relies (see, *e.g.*, Pet. 20-21). While "[i]t is true" that some courts "have periodically borrowed" or analogized to "the language of personal jurisdiction in discussing the due process constraints on extrater-

[11] Almost all of the criminal cases that petitioner cites on the due process issue also involve a narrow question—about offenses under the Maritime Drug Law Enforcement Act committed on foreign-flagged vessels—that has no relevance to this case. This Court has repeatedly denied review in cases presenting that narrow issue. See, *e.g.*, *Campbell* v. *United States*, 135 S. Ct. 704 (2014) (No. 13-10246); *Tam Fuk Yuk* v. *United States*, 132 S. Ct. 1536 (2012) (No. 11-6422); *Brant-Epigmelio* v. *United States*, 132 S. Ct. 1536 (2012) (No. 11-6306).

ritoriality," civil personal jurisdiction cases "do not establish actual standards for judicial inquiry" in a criminal case. *United States* v. *Ali*, 718 F.3d 929, 944 (D.C. Cir. 2013); see, *e.g.*, *United States* v. *Hijazi*, 845 F. Supp. 2d 874, 882 n.8 (C.D. Ill. 2011).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Acting Solicitor General
KENNETH A. BLANCO
Acting Assistant Attorney General
FINNUALA K. TESSIER
Attorney

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